



April 4, 2002

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2002-1665

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160743.

The City of El Paso (the "city") received a request for information relating to a complaint of police brutality. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

Initially, we address your representation that the information submitted as Exhibit E previously was addressed in Open Records Letter No. 2001-1374 (2001). That decision concludes, among other things, that certain medical records are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 159.001 *et seq.* You state that there has been no change in the facts and circumstances on which this aspect of the prior ruling is based. Accordingly, we conclude that the city may continue to rely on Open Records Letter No. 2001-1374 (2001) with respect to the documents submitted as Exhibit E. *See* Open Records Decision No. 673 at 6-7 (2001) (explaining that attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) where (1) precisely the same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D), (2) same governmental body previously requested and received a ruling, (3) prior ruling concluded that same records or information are or are not excepted from disclosure, and (4) law, facts, and circumstances on which prior ruling was based have not changed).

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the city to withhold any responsive information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Next, we address your claim under section 552.108 of the Government Code with respect to Exhibits B, C, and D. Section 552.108(a)(2) excepts from public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 applies to the information. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) is applicable to information that relates to a concluded case that did not result in a conviction or a deferred adjudication.

You inform this office that Exhibits B and C relate to concluded criminal investigations, neither of which resulted in a conviction or a deferred adjudication. You also inform us that Exhibit D relates to an administrative Internal Affairs investigation. You assert that as the administrative investigation involves the same facts and circumstances as the criminal cases, section 552.108(a)(2) is applicable to Exhibit D as well as Exhibits B and C. Based on your representations with respect to the outcome of the criminal investigations, we agree that section 552.108(a)(2) is applicable to Exhibits B and C. You also inform us that basic information relating to both criminal cases was previously released to this requestor. *See* Gov’t Code § 552.108(c); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 at 3-4 (1976). Consequently, we conclude that the city may withhold Exhibits B and C in their entirety under section 552.108(a)(2).

Section 552.108 is not applicable, however, to the records of an internal affairs investigation that is purely administrative in nature. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You do not inform us that the internal affairs investigation to which Exhibit D relates resulted in any criminal charges. Moreover, Exhibit D indicates that the subjects of the investigation were advised that statements given to internal affairs investigators could not be used in any criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office”). We therefore conclude that the city may not withhold Exhibit D under section 552.108.

You also claim that information contained in Exhibit D is protected by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses the common-law right to privacy. Common-

law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999). We have marked a small amount of information in Exhibit D that is protected by common-law privacy. The city must withhold the marked information under section 552.101.

In summary, the city may continue to rely on Open Records Letter No. 2001-1374 (2001) with respect to Exhibit E. The city may withhold Exhibits B and C under section 552.108 of the Government Code. The city must withhold the marked information in Exhibit D under section 552.101 in conjunction with common-law privacy. The rest of Exhibit D must be released. As we are able to make these determinations, we need not address your claim under section 552.130.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

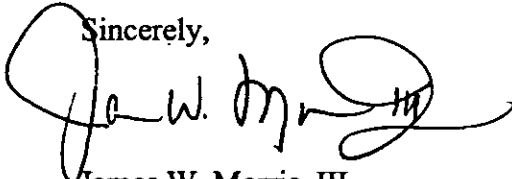
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a large, stylized initial 'J' and a long, sweeping underline.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 160743

Enc: Marked documents

c: Ms. Louie Gilot
El Paso Times
P.O. Box 20
El Paso, Texas 79901
(w/o enclosures)